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Tzung-Mou Wu

Legal History in Action: Laying Down Indigenous Customs in Writing

An Introduction

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Tzung-Mou Wu

Legal History in Action: Laying Down Indigenous Customs in Writing*

An Introduction

This Focus section discusses if and how continental legal historical scholarship on customs can help Taiwan's judiciary ascertain and apply indigenous customary norms in its daily operation.

The customs of indigenous peoples are not studied in their own terms here. Instead, the project leading to the papers in this section addresses legal professionals. It aims at crafting a toolbox of notions and concepts that facilitates the translation of indigenous norms and values in two senses of the word, to wit, translation into lawyers' language as well as into the juridical order of the State.

For lack of an accepted theory of custom in the contemporary legal theoretical literature, this project suggests that the components of such a toolbox be retrieved in the experiences of European legal cultures. Relevant instances include publicizing the hidden texts that derive customs (as Flavius allegedly did in Livy 9.46.5), the famous personality of laws, compiling manuals of local »customs« (as in Roman Egypt) or collections of oral traditions (as in the *Sachsenspiegel* and other law books) by private hands, cohabitation of multiple cultural communities (as in Sicily), and, of course, in the widespread practice of surveys of customs (as in France, the Low Countries, etc.) and countless litigations.

At least two facts explain the value of these experiences. On the one hand, the peoples or communities documented their own customs by and, in some cases, for themselves. On the other, they did so against the backdrop of the Roman-canon legal scholarship. If Bruno Latour has a point in the claim that the operation of law, considered in the *longue durée*, has never been modern in the Western world, conventionally trained legal professionals can, to put it simply, learn from these experiences how to better accommodate indigenous customs without doing another degree in anthropology.[1] As for the indigenous individuals and communities, they can fight fire with fire, asking the state machinery to find solutions from within. They can also, when corroborated by well-informed officials and counsellors, incrementally shape their contemporary »customs« by and for themselves.

To prepare these papers, I organized a 2-day workshop in the first full week of May 2015, in Taipei, Taiwan. Awi Mona, Jérôme Soldani, and Jasmin Hauck also participated actively in the event. The event was sponsored by the Institutum Iurisprudentiae at the Academia Sinica and Taiwan's Ministry of Science and Technology.

The section is divided into three parts. The first characterizes the state of the art, argues for the perspectives and approaches taken in the papers, and conducts some critical examinations of legal historical scholarship itself (Tzung-Mou Wu, Emanuele Conte).[2] The second consists of the individual case studies sampled from continental legal history (Soazick Kerneis, Bernd Kannowski, Claudia Storti, Charles de Miramon, Beatrice Pasciuta, Bram van Hofstraeten). The third and final draws comparisons and precautions from Latin America,

* This article is part of a research project supported by my institution and Taiwan's Ministry of Science and Technology. In this article, Taiwan refers to the regime officially named »Republic of China« that effectively governs the island of Taiwan or Formosa, the Pescadores (Penghu in Mandarin) Quemoy (or Kinmen) Matsu (or Mazu) and other smaller islands. Among her many aliases, the best-known is »Chinese Taipei«, used by the International Olympic Committee, and »the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (TPKM)«, though less popular, is used in the World Trade Organization. All terms of Chinese languages are transcribed according to their modern-day Mandarin pronunciation in the Hanyu Pinyin system, if unspecified. All non-western names are transcribed in the respective order.

1 Latour (2004).

2 Awi Mona's briefing on the project of a code of customs is to be published elsewhere.

which shares significant historical and institutional features with Taiwan (Rodrigo Míguez Núñez, Barbara Truffin).

The continental cases focus on what appears relevant to legislating in contemporary Taiwan. The common law is the absent defendant of these papers, since the related literature is so well-known in Taiwan and elsewhere that non-English contributions, however important they may be, are overlooked.[3] The traditions rooted in the Iberian Peninsula, Scandinavia, and the vast area east of the Duchy of Saxony are also left out for their remoteness. The chronological and geographical coverage as well as the variety of political configurations was taken into account. Thus, chronologically speaking, Soazick Kerneis studies the period between the second and the fifth century. Bernd Kannowski and Claudia Storti look to the north and the south of Alps, respectively, from the eighth century onward. Charles de Miramon and Beatrice Pasciuta focus on the conventional timespan of medieval legal scholarship, to wit, the period between the twelfth and the fifteenth century. Bram van Hofstraeten's work reaches the Early Modern Age. The legal traditions extend geographically from Rome to the Low Countries, passing by Sicily, Lombardy, Saxony, and Beauvais in northern France. Some of the locations studied are urban and others rural. Some of the political bodies in question were independent or largely autonomous; others were relatively subject to a hierarchy or an authority. By the way, a balanced representation of gender and national origins of the whole team was pondered in the participant selection process.

These papers address the following issues, among others: (1) the complexity of the significations of the term »custom« and the necessity of differentiating; (2) the politics of invoking, avoiding, preserving or abolishing a custom, and that of weighing and choosing over competing customs; (3) motives, techniques, effects, and possible offshoots for and against the effort to lay customs in writing.

All the papers have been rewritten in English, though the prior discussions were also conducted in French, Italian, and German. This monolingualism is meant to improve the papers' accessibility. It matters tremendously to this project that more legal historical literature written in a continental language become available to a wider audience, in particular to anthropologists. They, along with scholars of colonial and postcolonial studies, treat this section's topic differently. The gap separating the human and social scientific approaches to the issues of indigenous customs and what is suggested here appears much wider than that between the Common Law and the Civil Law. Toby Milsom, a renowned historian of the common law, provides a quip reinforcing this claim: »anthropologists and sociologists may make general observations about law, but not lawyers.«[4] One may also add the categories of economist and »law-and-ist« to the top of the list.

Indeed, legal history and historical jurisprudence have been discredited for a long time. When not ignored, they invite outsiders' mockery or contempt, and provoke insiders' self-censorship, when the role of the lawyer comes ahead of the historian's or, unfortunately, when something about Germany is involved. While the country was under occupation, Heinrich Mitteis quoted Raymond Saleilles's following comment twice without specifying his reference: »The German people demanded social reforms, and they got philology.«[5]

The nineteenth century, on which the comment bears, is long gone. Yet the clichés of the time remain. As some recent monographs and edited volumes on customs and customary law published by U. K.- and U. S.-based legal scholars attempt to restore the reputation of, explicitly, legal history and, implicitly, historical jurisprudence, clichés

3 Ghislain Otis's case is telling. Holding the Canada Research Chair in Legal Diversity and Aboriginal Peoples and as Fellow of the Royal Society of Canada, he is, unfortunately, barely known in Taiwan despite his expertise in the accommodation of indigenous customs in Quebec's civil law jurisdiction. None of his publications are available in the country. On the contrary, there is plenty of information on the law of indigenous peoples in English-speaking provinces of Canada.

4 Milsom (2003) xiii.

5 Mitteis (1950) 269; Mitteis (1951) 677.

take the place that should belong to current German-speaking literature.[6] Those contributions are to be thoroughly reviewed elsewhere. What matters here is that neither Joachim Rückert nor Peter Landau is mentioned in any of the books on Savigny's *Volksgeist*, customs in canon law, or Suárez's theory of customary law. German is no more oracular for legal historical studies than any other language. Nor can it sanctify otherwise unconvincing work. The debate section in this journal's seventeenth issue explains why.[7] Nonetheless, for the studies of customs, the German-speaking literature deserves more attention than most English-speaking milieus currently pay it to avoid reinventing the wheel. Besides, there is respectable and robust Italian scholarship on local customs, which, to my regret and the world's detriment, is typically ignored when expressed in its mother tongue.

It may be unpractical to suggest senior legal historians learn a new language to write or edit only one or two books. Yet for the skeptics of legal history and historical jurisprudence at least, hopefully, the papers in this section can persuade them to update their knowledge, drop the clichés, and look afresh at the possible contributions made by the formerly condemned disciplines to the protection of indigenous customs.

■

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6 See Perreau-Saussine / Murphy (2007); Kim (2014).

7 See debate section in: Rg 17 (2010) 15–90.